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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

OCT 25 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Accent Communications, Inc.,)
Armour Independent Telephone)
Company, Bridgewater-Canistota)
Independent Telephone Company,)
James Valley Cooperative Telephone)
Company, RC Communications, Inc.,)
and Roberts County Telephone)
Cooperative Association)

CC-96-45

To: Common Carrier Bureau

REQUEST TO REMOVE UNIVERSAL SERVICE CAPS

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COMMUNICATIONS, INC., AND ROBERTS
COUNTY TELEPHONE COOPERATIVE
ASSOCIATION

October 15, 1999

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SUMMARY

Accent Communications, Inc., Armour Independent Telephone Company, Bridgewater-Canistota Independent Telephone Company, James Valley Cooperative Telephone Company, RC Communications, Inc., and Roberts County Telephone Cooperative Association (collectively, the "South Dakota LECs"), by their attorney, respectfully request the Common Carrier Bureau (Bureau) to remove the caps on their universal service support and to calculate their universal service support based on the average cost of their lines as of January 1, 2000. In other words, the South Dakota LECs request the Bureau to grant to each of them the relief that was granted to the South Dakota petitioners in Petitions for Waiver and Reconsideration Concerning Sections 36.611, Memorandum Opinion and Order on Reconsideration, AAD 93-93, 95-72, 95-30, 97-21, 97-23, 97-117, 98-44, 98-53, DA 99-1845, para. 16, released Sept. 9, 1999. If the Bureau were to decide that it needs additional data, the South Dakota LECs respectfully request the Bureau to give them an opportunity to submit the necessary data. Finally, in the event that the FCC does not issue an order granting the South Dakota LECs' requests until after January 1, 2000, the South Dakota LECs respectfully request that any order removing their caps be effective as of January 1, 2000.

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To: Common Carrier Bureau

REQUEST TO REMOVE UNIVERSAL SERVICE CAPS

Accent Communications, Inc. (Accent), Armour Independent Telephone Company (Armour), Bridgewater-Canistota Independent Telephone Company (Bridgewater-Canistota), James Valley Cooperative Telephone Company (James Valley), RC Communications, Inc. (RC), and Roberts County Telephone Cooperative Association (Roberts County) (collectively, the "South Dakota LECs"), by their attorney, respectfully request the Common Carrier Bureau (Bureau) to remove the caps on their universal service support and to calculate their universal service support based on the average cost of their lines as of January 1, 2000. In other words, the South Dakota LECs request the Bureau to grant to each of them the relief that was granted to the South Dakota petitioners in Petitions for Waiver and Reconsideration Concerning Sections 36.611, Memorandum Opinion and Order on Reconsideration, AAD 93-93, 95-72, 95-30, 97-21, 97-23, 97-117,

98-44, 98-53, DA 99-1845, para. 16, released Sept. 9, 1999
[hereinafter USF Cap Removal Order].

BACKGROUND

Several years ago, U S WEST and GTE sold dozens of their rural exchanges to small local exchange carriers (LECs). In granting the associated study area waivers, the FCC typically imposed caps on the universal service support to be received by the buyers in those transactions. Recently, the Bureau removed the universal service caps for some of the buyers in states such as Idaho, North Dakota, South Dakota and Vermont.¹

In particular, the Bureau removed the universal service caps imposed on Sanborn Telephone Cooperative, Sancom, Inc., Stockholm-Strandburg Telephone Company, Sully Buttes Telephone Cooperative, Inc., Valley Cable & Satellite Communications, Inc., Valley Telecommunications Cooperative Association, Inc., and Venture Communications, Inc. (collectively, the "Sanborn LECs"), as of January 1, 2000. These LECs had participated in an acquisition of South Dakota exchanges from U S WEST. The necessary waivers were granted by the Bureau in the Petitions for Waivers Filed by Accent Communications, Inc., Memorandum Opinion and Order, 11 FCC Rcd. 11,513 (1996) [hereinafter South Dakota Waiver Order]. The South Dakota LECs participated in the same

¹ USF Cap Removal Order paras. 2-16.

acquisition as the Sanborn LECs, and were included in the same South Dakota Waiver Order.

The South Dakota LECs and the Sanborn LECs also are parties to a pending Application for Review in which they ask the Commission to remove the universal service caps.² The Sanborn LECs had filed their "Conditional Request to Raise Universal Service Caps" after the filing of the Application for Review. In the Conditional Request, the Sanborn LECs asked the Bureau to raise their universal service caps if the Commission does not grant their request to have the caps totally removed.³ Without waiting for the Commission to act on the Application for Review, the Bureau prospectively removed the caps for the Sanborn LECs in the USF Cap Removal Order.

The South Dakota LECs therefore submit this Request to say "Me Too". They request the Bureau to remove the caps on their universal service support as of January 1, 2000 just as the Bureau removed the caps for the Sanborn LECs in the USF Cap Removal Order -- and to do so without prejudice to the other relief requested in the pending Application for Review.

I. The Universal Service Caps Have Limited the South Dakota LECs' Support and Should Be Removed

In the USF Cap Removal Order, the Bureau removed the caps

² Accent Communications, Inc., Joint Application for Review, AAD 95-124 (filed May 13, 1996) (pending).

³ Sanborn Telephone Cooperative, Conditional Request to Raise Universal Service Caps, AAD 98-48 (filed March 27, 1998).

imposed on the petitioners, and stated that "the individual caps placed on the carriers' high cost loop support have served their purpose by preventing the carriers from underestimating the effect the transfer of exchanges would have on the high cost loop support mechanism immediately following the transfer."⁴ The Bureau concluded that "limiting the petitioners to the high cost loop support estimated in their original petitions, in perpetuity, is not necessary" and that "limiting the duration of these caps is appropriate."⁵

The same is true in the case at hand for the South Dakota LECs. If the purpose of the universal service caps was to ensure that the South Dakota LECs comply with the universal service estimates they made before they acquired the exchanges, the caps have served that purpose. There is no reason to continue to impose the caps on the South Dakota LECs.

In the USF Cap Removal Order, the Bureau noted that the caps were imposed over three years prior to the January 1, 2000 date on which they would be removed.⁶ The same is certainly true for the South Dakota LECs which were part of the same transaction as the Sanborn LECs,⁷ and therefore have been subject to the universal service caps for the same period of time.

⁴ USF Cap Removal Order para. 10.

⁵ Id. paras. 9-10.

⁶ Id. para. 10.

⁷ South Dakota Waiver Order para. 1 nn.2-3.

Other Commission precedent also compels removal of the caps. For example, in granting a study area waiver to another LEC, J.B.N. Telephone Company, Inc. (JBN), the Bureau did not impose a cap in perpetuity. The Bureau imposed a cap only for a three-year period.⁸ In doing so, the Bureau cited no facts and otherwise provided no justification for limiting the duration of the cap specifically for JBN. The Bureau should similarly limit the duration of the caps on the South Dakota LECs.

Other Bureau precedent demonstrates that no caps were necessary in the first place. Shortly after the Bureau imposed caps on the South Dakota LECs, each of which is an average schedule company,⁹ the Bureau ceased imposing universal service caps on average schedule companies involved in acquisitions.¹⁰ For example, when the Bureau granted study area waivers for the Nebraska transaction, the Bureau stated: "We do not establish a limit for average schedule companies . . . because their USF

⁸ USF Cap Removal Order para. 10 n.22; Petitions for Waivers Filed by J.B.N. Telephone Company, Inc., Memorandum Opinion and Order, 11 FCC Rcd. 8619 para. 12 (1996).

⁹ South Dakota Waiver Order paras. 32, 42-44.

¹⁰ See Petitions for Waivers Filed by Bryant Pond Tel. Co., Memorandum Opinion and Order, 12 FCC Rcd. 1479 para. 17 (1997) [hereinafter Maine Waiver Order] (not capping average schedule companies because their USF draws are not related to their costs); Petitions for Waivers Filed by Alpine Communications, L.C., Memorandum Opinion and Order, 12 FCC Rcd. 2367 para. 12 (1997) [hereinafter Iowa Waiver Order]; Petitions for Waiver Filed by Farmers Mutual Telephone Company, Memorandum Opinion and Order, 11 FCC Rcd. 9380 (1996) (not capping Farmers, an average schedule company).

draws are not directly related to their costs."¹¹

The same is true for the South Dakota LECs. Any upgrades they make to their networks do not affect the universal service support they receive. A cap can serve no purpose when the South Dakota LECs have no control over the amount of universal service support they receive. Any pre-acquisition estimates of their post-acquisition universal service support have been affected only by post-acquisition changes to NECA's average schedule formulas, not by any action on the part of the South Dakota LECs.

It is a fundamental principle of administrative law that agencies must treat similarly situated parties alike.¹² The FCC therefore must remove the caps on the South Dakota LECs' universal service support as of January 1, 2000, just as it: (a) removed the caps of the Sanborn LECs in the USF Cap Removal Order; (b) limited the duration of the universal service cap for JBN; and (c) refrained from imposing caps on other average schedule companies.

In the event that the FCC does not issue an order granting the South Dakota LECs' request until after January 1, 2000, the South Dakota LECs respectfully request the order to be effective as of January 1, 2000. Otherwise, the South Dakota LECs and their rural customers would be harmed by the happenstance of the

¹¹ Petition for Waivers Filed by Arapahoe Tel. Co., Memorandum Opinion and Order, AAD 96-59, DA 96-1894, para. 11, released Nov. 15, 1996 [hereinafter Nebraska Waiver Order].

¹² See McElroy Electronics Corp. v. FCC, 990 F.2d 1351, 1365 (D.C. Cir. 1993); Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965).

date on which the order is released. A retroactive effective date would be consistent with other Bureau decisions where the effective dates of orders were made retroactive in order to provide sufficient universal service support to rural LECs and otherwise to reduce the regulatory burdens on small telephone companies.¹³

II. Removal of the Caps Will Support the South Dakota LECs' Implementation of Network Upgrades

Removal of the universal service caps for the South Dakota LECs is in the public interest, as it was for the petitioners in the USF Cap Removal Order. There, the Bureau stated:

We also believe that caps of unlimited duration may hinder petitioners' incentive and ability to extend service to previously unserved areas, as well as to upgrade service to their existing customers. . . . In addition, we believe that lifting the caps on petitioners' high cost support may increase their incentive and ability to extend service to previously unserved areas and upgrade their networks.¹⁴

Similarly, in the case at hand, removal of the caps for the South Dakota LECs would support their deployment of fiber throughout their networks and other upgrades to plant facilities, in order

¹³ See, e.g., Petition for Waiver Filed by Vermont Telephone Company, Order on Reconsideration, 14 FCC Rcd. 826 (1998) (granting Vermont Telephone Company an effective date over five months before the release of the original order in order to provide sufficient universal service support via DEM weighting); TelAlaska, Inc., Memorandum Opinion and Order, 13 FCC Rcd. 22,729, 22,731, 22,736 (1998) (changing the universal service support available to TelAlaska retroactive to a date prior to when TelAlaska filed its petition).

¹⁴ USF Cap Removal Order paras. 9-10 (footnotes omitted).

to support the delivery of advanced service offerings such as DSL, SONET rings, and fiber-to-the-curb technologies, as well as additional lines for their subscribers. In sum, removal of the caps for the South Dakota LECs will enable them to upgrade their networks to benefit their rural customers.

III. The Bureau Should Remove the Universal Service Caps Without Requiring the South Dakota LECs to Submit Additional Data

The South Dakota LECs have not provided data to support this Request because the Bureau did not consider any data in deciding to remove the caps of petitioners in the USF Cap Removal Order, and it did not consider any data in deciding not to impose caps on other average schedule companies. Indeed, information about the universal service support that would be received from January 1, 2000 on was not provided by the petitioners referred to in the USF Cap Removal Order as Albion, CTC, Champlain, Midvale, Northland, Table Top and Tularosa,¹⁵ or by the average schedule

¹⁵ Champlain Valley Telecom, Inc., and Northland Telephone Company of Vermont, Petitions for Reconsideration, AAD 95-30 (July 15, 1996) ("Champlain" and "Northland"); Table Top Telephone Company, Petition for Waiver, AAD 97-21 (December 23, 1996) ("Table Top"); and Midvale Telephone Exchange, Petition for Waiver, AAD 97-23 (January 16, 1997) ("Midvale"); BEK Communications I, Inc.; CTC Communications, Inc.; Dakota Central Telecom I, Inc.; Dickey Rural Communications, Inc.; Dickey Rural Telephone Cooperative; Gilby Telephone Company; Griggs County Telephone Company; Inter-Community Telephone Company II, Inc.; Moore & Liberty Telephone Company; Northwest Communications Cooperative; Red River Telecom, Inc.; RTC II, Inc.; Turtle Mountain communications, Inc.; US West Communications, Inc.; United Telephone Mutual Aid Cooperative; West River Communications, Inc.; and York Telephone Company, Expedited Request for Elimination or Modification of Waiver Conditions, AAD 97-117 (December 22, 1997) ("CTC"); Tularosa Basin Telephone

companies involved in the Iowa, Maine and Nebraska transactions.¹⁶ The Bureau, nevertheless, removed the universal service caps for all of the companies in the USF Cap Removal Order that requested it,¹⁷ and refrained from imposing caps on the Iowa, Maine and Nebraska average schedule companies in the first instance.

In accordance with McElroy Electronics and Melody Music, the Bureau must treat similarly situated parties alike, and should remove the South Dakota LECs' universal service caps without requiring them to submit factual information that was not required of the LECs in these other Bureau orders. Indeed, requiring the South Dakota LECs to provide the data would place an undue financial burden on the South Dakota LECs which would need to bear the expense of developing the necessary data. Requiring the South Dakota LECs to bear that expense would be contrary to the Commission's oft-stated goal of reducing the

Company, Expedited, AAD 98-44 (February 27, 1998) ("Tularosa"); Albion Telephone Company; BPS Telephone Company, Inc.; Cambridge Telephone Co., Inc.; Fremont Telecom; Leaco Rural Telephone Cooperative, Inc.; Midvale Telephone Exchange, Inc.; Rockland Telephone Company, Inc.; South Central Communications, Inc.; Table Top Telephone Co., Inc.; Tularosa Basin Telephone Company, Inc.; United Utilities, Inc.; and West River Telephone Cooperative, Inc., Petition for Expected Elimination or Modification of Waiver Conditions, AAD 98-53 (April 3, 1998) ("Albion").

¹⁶ Nebraska Waiver Order para. 11; Maine Waiver Order para. 17; Iowa Waiver Order para. 12.

¹⁷ USF Cap Removal Order paras. 2-16.

regulatory burdens on small LECs.¹⁸ Nevertheless, if the Bureau were to decide that it needs more information from the South Dakota LECs, they respectfully ask the Bureau to give them the opportunity to submit the necessary data, and to provide a reasonable amount of time to respond to the data request.

CONCLUSION

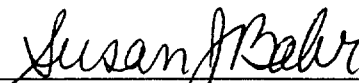
For the foregoing reasons, Accent, Armour, Bridgewater-Canistota, James Valley, Roberts County and RC each respectfully request the Bureau to remove the caps on their universal service support and to calculate their universal service support based on the average cost of their lines as of January 1, 2000 -- just as the Bureau did for the Sanborn LECs in the USF Cap Removal Order -- and to do so without prejudice to the other relief requested in the pending Application for Review. If the Bureau were to decide that it needs more data in support of this Request, the South Dakota LECs respectfully request the Bureau to give them an opportunity to submit the necessary data, as discussed above. Finally, in the event that the FCC does not issue an order granting the South Dakota LECs' requests until after January 1,

¹⁸ See, e.g., Minburn Telecommunications, Inc., Memorandum Opinion and Order, DA 99-1809, released Sept. 3, 1999 ("the Commission has always been sensitive to the administrative burdens imposed on small telephone companies by the application of its rules"); Telephone Number Portability, Second Memorandum Opinion and Order on Reconsideration, 13 FCC Rcd. 21,204, 21,235 (1998) (noting that the Commission had reduced the burdens on small and rural telephone companies).

2000, the South Dakota LECs respectfully request that any order removing their caps be effective as of January 1, 2000.

Respectfully submitted,

ACCENT COMMUNICATIONS, INC., ARMOUR
INDEPENDENT TELEPHONE COMPANY, BRIDGEWATER-
CANISTOTA INDEPENDENT TELEPHONE COMPANY,
JAMES VALLEY COOPERATIVE TELEPHONE COMPANY,
RC COMMUNICATIONS, INC., AND ROBERTS COUNTY
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October 15, 1999

CERTIFICATE OF SERVICE

I, Susan J. Bahr, Law Offices of Susan Bahr, PC, certify that on this 15th day of October 1999, I have caused to be sent via the U.S. Postal Service, first class mail, postage prepaid, a copy of the foregoing Request to:

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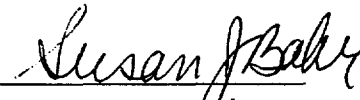
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